LOS ANGELES
Daily Journal
www.dailyjournal.com
FRIDAY, SEPTEMBER 12, 2014

PERSPECTIVE

The power of a well-crafted arbitration clause

By Bruce A. Friedman

Conventional wisdom among law firm general counsel is that engagement letters should include an arbitration clause requiring the arbitration of legal malpractice claims against their firms. This general view is based in large part on the fact that arbitration is not public and therefore better suited than a lawsuit to preserving and protecting the reputation of the firm and its partners.

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As a former law firm managing partner and general counsel, I shared this view. So you can imagine my surprise when I learned from a number of legal malpractice insurers that they do not like mandatory arbitration of legal malpractice claims and prefer that their insured law firms and lawyers not include an arbitration clause in their fee agreements.

The insurers view is grounded in their experience. Their concerns include the absence of case-determinative motions in arbitration. Many legal malpractice claims are eliminated in law and motion, either by demurer, motion to dismiss or summary judgment. The insurers' concern is that the filing of such motions is at best discretionary under the rules of arbitration of the major dispute resolution entities. And, even if permitted by the arbitrator, the motions may be denied because of the arbitrator's fear that the award will be subject to subsequent attack in court on the basis that the arbitrator did not hear all of the evidence.

The insurers' experience also leads them to the conclusion that the fear of a jury trial in a legal malpractice case is overblown as only a small fraction of these cases ever goes to trial. Insurers' other concerns about arbitration include the limitations on discovery under arbitration rules, the relaxation of the rules of evidence, and the elimination of the right to appeal. Last but not least, the insurers are concerned that an arbitrator has broad latitude in deciding cases and that the result may not follow the law. This makes the outcome of the case less predictable than in a court of law.

So is this an all-or-nothing proposition? Is it either court or arbitration? Or can one get the advantages of both? The answer is a well-crafted arbitration clause that addresses all of the insurers' concerns. It can provide for motions, discovery under the California Code of Civil Procedure or Federal Rules of Civil Procedure, the application of federal or state rules of evidence, and choice of law. The arbitration clause can also include an appeal process before a former justice or panel of justices of the Court of Appeal, and stipulate the qualifications of the neutral.

A well-crafted arbitration clause can provide all of the benefits of proceeding in court as well as the benefits of arbitration. The parties can still have input into the choice of neutral who meets their agreed upon qualifications as well as the efficiency of scheduling law and motion within a reasonable time and a fixed arbitration date. This should ease the concerns of both law firm general counsel and their malpractice insurers.

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